



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 46/12

In the matter between

Not Reportable

FAROUK MEYER

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: Meyer v The State (46/12) [2013] ZASCA 208 (28 November 2013)

Coram: Cachalia, Shongwe, Majiedt JJA

Heard: 18 NOVEMBER 2013

Delivered: 28 NOVEMBER 2013

Summary: Criminal law – application for special leave to appeal, for condonation of the late filing of the application and an application to lead new evidence – tests restated – evidence of independent witnesses overwhelming on convictions – requirements for the presenting of new evidence not met – sentence – material misdirection by the trial court in respect of applicability of the minimum sentence legislation – special leave to appeal granted against sentence on two murder counts – sentence set aside and, upon consideration de novo, life sentences substituted with sentence of 24 years’ imprisonment.

ORDER

On appeal from: Witwatersrand Local Division (Van Oosten, Snyders and Coetzee JJ, sitting as court of appeal):

- (1) Condonation is granted for the late filing of the application for special leave to appeal.
- (2) The application for leave to appeal against the convictions is dismissed.
- (3) The application for leave to lead new evidence on appeal is dismissed.
- (4) The application for leave to appeal against the sentences imposed on counts 3 and 5 is granted.
- (5) The appeal against sentence is partly upheld. The order of the court below confirming the life sentences on counts 3 and 5 imposed by the trial court is set aside and substituted with the following:
 - ‘(a) The accused is sentenced to 24 years’ imprisonment on each of counts 3 and 5.
 - (b) The sentences on counts 1, 2, 4, 5, 7 and 8 are to run concurrently with the sentence on count 3.
 - (c) The sentences are antedated to 9 November 2000’.

JUDGMENT

MAJIEDT JA (Cachalia and Shongwe JA concurring):

[1] The applicant, Mr Farouk Meyer, applies for special leave to appeal against a judgment of the full court of the Witwatersrand Local Division (as it was then known), by van Oosten J, Snyders and Coetzee JJ concurring (the main application). This judgment, dismissing the applicant's appeal against his convictions and sentences by Bam AJ, was delivered on 23 August 2002 and there is consequently an accompanying application for condonation for the late filing of the main application. The applicant also applies for leave to lead new evidence on the merits of his convictions. All these applications were referred for oral argument in this Court. The applicant prepared his application in person, but procured legal representation at a very late stage to argue the matter. He was legally represented at his trial, in the court below and for a period thereafter.

[2] The convictions emanate from a shooting incident in a popular night club, Club 12 Play (which actually consists of 2 separate nightclubs), in Roodepoort on 17 October 1999, during which inter alia three persons were shot dead, another one was shot and wounded and a fourth was seriously assaulted. The appellant was convicted for these offences, ie three counts of murder, one count of attempted murder, one count of assault with intent to do grievous bodily harm, unlawful possession of the firearm and unlawful possession of an unknown quantity of ammunition. Sentences ranging from 6 months' imprisonment (for the unlawful possession of ammunition) to two life sentences (on two of the murder counts) were imposed. Before I elaborate on the factual matrix underlying the convictions, I deal first with the condonation application.

Condonation

[3] As is evident from the introductory paragraph above, this application for special leave is being brought some 11 years after the dismissal of the appeal in the court below. This is an extraordinarily long delay. The explanation proffered by the applicant, namely that he first had to gather proof 'that (he)

was framed and that the evidence that was led during (his) trial was false' (in essence the applicant's case in the main application is that the investigating officer, Inspector Coetzee, had manipulated the entire investigation) is not persuasive and is contrary to other objective facts which I do not deem necessary to refer to. The test for condonation entails, broadly speaking, an evaluation in the main of the degree of non-compliance and the explanation therefor as well as the prospects of success (see *S v Senkhane* 2011 (2) SACR 493 (SCA) at paras 28 and 29). Given the explanation for the long delay, the prospects of success in the main application will be decisive in the condonation application.

The merits of the application for special leave to appeal against the convictions

[4] The determination of reasonable prospects of success on appeal has recently been restated by this court as follows in *Smith v S* (2012) (1) SACR 567 (SCA) para 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[5] There were two mutually destructive versions of the shootings and assault in the nightclub before the trial court. On the State's case the applicant was the aggressor, while he maintained that he acted in self-defence. The incident appears to have arisen after a criminal gang known as the Majimbos split, resulting in the formation of two camps, one led by the applicant and the other by one of the deceased, Mr Gerald Jacobs (also known as 'Wange' or

'Cheeks'), who is said to have been the leader of the Majimbos. Several shootings had preceded the incident in question. The eyewitnesses who testified for the State, including the complainant on the attempted murder charge, Mr Shaun Geduld (also known as 'Ziggies'), were in the Jacobs camp, so that caution has to be applied in evaluating their testimony, particularly insofar as they incriminate the applicant.

[6] The State case is that at the time of this incident (around 1 or 2 am), there were more than 1000 patrons in the nightclub. An altercation ensued in the so-called VIP bar area of the one club. The applicant became involved in this altercation. On the State's version the applicant left the club in a highly agitated state during the course of the altercation. On exiting the VIP bar area, he collided with Ms Fahmieda Mahomed. She swore at him and he retaliated by hitting her with a glass in the face. The glass shattered, causing severe facial cuts to Ms Mahomed, for which she required extensive reconstructive plastic surgery. It appears as if the applicant's right hand was also cut in the process. Ms Mahomed retaliated, also with a glass. The applicant then left the club. This incident forms the basis of the conviction of assault with intent to do grievous bodily harm.

[7] The applicant returned a few minutes later with a .357 Magnum Taurus revolver. He fired a shot in the ceiling at the entrance and proceeded inside where he fired four further shots in the vicinity of the VIP bar area, killing Jacobs, Mr Desmond Bethanie and Mr David Malgas and also wounding Geduld in the knee. The applicant left the club and handed the revolver in at the Eldorado Park police station. At the trial it was formally admitted by the defence that the three deceased had all died due to gunshot wounds caused by this revolver.

[8] The applicant gave a completely different version. He confirms that there was an altercation at the VIP bar area, instigated by members of the

Jacobs group. He intervened and tried to stop the brawl, but was hit from behind with a bottle by a person known as Elvis. Another person, known as 'Muis', ran towards him with two broken bottles in his hands and stabbed the applicant in the right hand. He overheard Geduld asking Jacobs to hand him (Geduld) the gun. When Geduld got the firearm, the applicant and Geduld wrestled for possession thereof and two shots went off. He saw Jacobs running towards him with a bottle and he fired a shot towards Jacobs. Another person jumped in between them and the bullet struck both this person (who later turned out to be the deceased, Bethanie) and Jacobs. The applicant exited the club and was attacked by one Kiron. To deter him the applicant fired another shot into the air at the entrance to the club. He then drove to the Eldorado Park police station where he handed in the firearm. He sustained injuries to his nose, head and right hand during the incident. He denied assaulting Ms Mohamed and alleged that he had seen her for the first time in court.

[9] Numerous discrepancies in the various State witnesses' versions and between them were highlighted during argument before us. We were referred to various aspects which, so it was contended, favoured the applicant's version on the probabilities. The dock identification of the applicant by Ms Mahomed at the trial was contended to be unreliable. The lingering animosity between and preceding attacks on each other by the two groups were emphasized as a reason for possible false testimony by the witnesses aligned to the Jacobs faction. The trial court was alive to all of these aspects. The learned judge sought and found corroboration for Ms Mahomed's version in the evidence of other witnesses. He was mindful of the prevailing enmity between the two groups and consequently approached the evidence of those witnesses aligned to the Jacobs faction with discernible circumspection. The crucial evidence which tilts the scales heavily in favour of the State's version, is, in my view, the evidence adduced by Mr de Villiers and, to a lesser extent, that of Mr Jonck. These are two completely independent witnesses, not aligned to any faction.

[10] De Villiers was the manager of the club at the time. He testified that, while inside the club, he heard a shot being fired outside and then saw the applicant entering the club, brandishing a firearm. The applicant passed about a metre from him when he entered the club. De Villiers said he heard three or four more shots fired in rapid succession inside the club. He entered and saw the bodies of the three deceased in the VIP bar area. De Villiers attended an identification parade afterwards where he positively identified the applicant (whom he had not known before the incident) as the person whom he had seen brandishing the firearm on that evening. The trial court held that the identification parade was procedurally open to some criticism, due to Inspector Coetzee's (the investigating officer) involvement in some aspects of the arranging and setting up of the parade. The learned judge consequently approached this evidence with some caution. In my view the trial judge was overly cautious. No untoward conduct was ascribed to the investigation officer, nor did any prejudice against the accused flow therefrom. The identification was in my view made under acceptable circumstances and in terms of proper procedures.

[11] Jonck was the head of security at the club. He testified that the club was very busy that night. He was stationed at the entrance to the club. According to him a woman exited the club at some stage, her face full of blood (this must have been Ms Mahomed); shortly thereafter he heard a gunshot and he took evasive action. He saw two persons running into the club, but was unable to recognise them. He hid behind a concrete pillar and heard four more gunshots inside the club. After the shooting was over he entered the club and saw the bodies of the three deceased.

[12] Applicant's counsel correctly conceded that the major hurdle for the applicant on the merits was the evidence of Jonck (as to the sequence of events) and in particular that of de Villiers (relating to the sequence of events and the applicant's identification as the person in possession of the firearm).

In my view this hurdle is insurmountable. The evidence of these two witnesses tilts the scales decisively in favour of the State. The trial court correctly rejected the applicant's version as false beyond reasonable doubt, finding that it was riddled with inconsistencies, improbabilities and contradictions. While the applicant made much in his papers of the alleged manipulation of the evidence by the investigating officer, in particular the alleged tampering with the ballistic evidence, his counsel did not advance any argument at all on this aspect, understandably so. Nothing more needs therefore to be said about it.

The prospects of success in the application for leave to lead new evidence

[13] The applicant seeks leave to lead the new evidence of the following witnesses on appeal:

- (a) Captain Barends – this evidence relates to the now abandoned point on the tampering with ballistic evidence and would serve no purpose whatsoever;
- (b) Inspector Stander – it is not clear what purpose this witness's evidence would serve;
- (c) Inspector Coetzee – no new evidence emerges from the proposed testimony and can be disregarded altogether;
- (d) Dr David Klatzow – this is a forensic expert whose evidence is also aimed at the alleged tampering with ballistic evidence. Apart from the fact that that challenge has now been abandoned, applicant's counsel correctly in my view disavowed any reliance on Dr Klatzow's report, since it is manifestly plain that he was not familiar with the trial record.
- (e) The recantation of the evidence of Geduld and Mohamed Rashid Petersen – these two witnesses now seek to recant their earlier testimony. On either score they would have perjured themselves in at least one instance and this ought not to be countenanced.

[14] Applicant's counsel conveyed to us that he had instructions not to abandon the application for leave to lead new evidence, but he did not present any argument on it, save for the concession in respect of Dr Klatzow. There is absolutely no merit in the application to lead new evidence and it ought to be dismissed.

The merits on the application for leave to appeal against sentence

[15] The applicant was sentenced as follows:

- (a) Count 1, assault with intent to commit grievous bodily harm: 8 months' imprisonment;
- (b) Count 2, attempted murder: Five years' imprisonment;
- (c) Count 3, murder (Jacobs): Life imprisonment;
- (d) Count 4, murder (Malgas): Ten years' imprisonment;
- (e) Count 5, murder (Behtanie): Life imprisonment;
- (f) Count 7, unlawful possession of a firearm: Two years' imprisonment;
- (g) Count 8, unlawful possession of ammunition: 6 months' imprisonment.

Leave is sought in respect of the two life sentences on counts 3 and 5. The trial court imposed these sentences by virtue of the provisions contained in s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). But this constitutes a material misdirection, since it is common cause that the indictment made no mention at all that the State would invoke the minimum sentence legislative provisions, namely s 51(1), read with s 51(3) of the Act, which provide that absent any substantial and compelling circumstances, a court must sentence an accused person to life imprisonment for inter alia planned or premeditated murder. This aspect was never raised by the prosecution either at the plea stage or at any other stage thereafter during the trial. It is self-evident that an accused person would be inclined to approach his or her defence strategy differently in respect of a charge where he or she faces a minimum sentence of life imprisonment for murder (in terms of s 51(1), read with s 51(3) of the Act) as opposed to a murder charge with a minimum sentence of 15 years' imprisonment (in terms of s 51 (2)(a), read with s 51(3)).

[16] It is by now well settled that there is a duty on the prosecution, in the interests of the constitutional right to a fair trial, to bring pertinently to the accused's attention that it intends to rely upon the minimum sentencing regime created by the Act. If this is not done in the indictment or the charge sheet, it must be done at a time and in a manner which affords the accused sufficient notice of the State's intention so as to enable him or her to prepare properly for his or her defence. See: *S v Legoa* 2003 (1) SACR 13 (SCA) para 20; *S v Makatu* 2006 (2) SACR 582 (SCA) paras 4 – 7.

[17] This material misdirection has the effect that special leave to appeal against sentence should be granted. This court may consider sentencing afresh in the light of this material misdirection. The applicant's personal circumstances were briefly as follows at the sentencing stage – he was a young man, 24 years of age, ran his own business and supported his family with the income generated from it. He was treated as a first offender for sentencing purposes. The gravity of his crimes is self-evident. The applicant left the club in a rage and fetched a firearm from outside. He had a few minutes to calm down and to reflect on what he was about to do. His intent was plain – upon re-entry to the club he fired a shot in the air to facilitate his entry past the security guards. He then proceeded to fire three or four shots with a powerful revolver in a club filled with patrons, more than 1000 according to the evidence. He shot to kill and, as is evident from the killing of Malgas, he had no regard for the safety of the many bystanders. The interests of society demand that these crimes be visited with severe penalties. But the applicant has been in custody for about 14 years, one year of which was spent while awaiting trial. This is a factor which bears consideration in arriving at an appropriate sentence. It appears that the incident was precipitated by the altercation to which I have referred. This set in motion the chain of events which lasted no more than a few minutes. There was no evidence to suggest that the applicant had planned the shooting.

[18] I am of the view that a sentence of 24 years' imprisonment on each of counts 3 and 5 will be a just sentence in the circumstances. All the various convictions emanate from one single incident and it is therefore proper that the sentences on counts 1, 2, 4, 5, 7 and 8 run concurrently with the sentence on count 3, ie an effective sentence of 24 years imprisonment.

[16] I make the following order:

- (1) Condonation is granted for the late filing of the application for special leave to appeal.
- (2) The application for leave to appeal against the convictions is dismissed.
- (3) The application for leave to lead new evidence on appeal is dismissed.
- (4) The application for leave to appeal against the sentences imposed on counts 3 and 5 is granted.
- (5) The appeal against sentence is partly upheld. The order of the court below confirming the life sentences on counts 3 and 5 imposed by the trial court is set and substituted with the following:
 - '(a) The accused is sentenced imprisonment to 24 years' on each count 3 and 5.
 - (b) The sentences on counts 1, 2, 4, 5, 7 and 8 are run concurrently with the sentence on count 3.
 - (c) The sentences are antedated to 9 November 2000'.

S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

For Appellant: J G Cilliers SC with B C Stoop
Instructed by: L S Francis Attorneys, Johannesburg

For Respondent: Z J van Zyl SC
Instructed by: Director of Public Prosecution, Johannesburg